

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK**

CAR-FRESHNER CORPORATION, and  
JULIUS SÄMANN LTD.,

Plaintiffs,

v.

AMERICAN COVERS, LLC F/K/A  
AMERICAN COVERS, INC. D/B/A  
ENERGIZER, ENERGIZER HOLDINGS,  
INC., and ENERGIZER BRANDS, LLC,

Defendants.

Civil Action No.: 5:17-cv-171 (FJS/ATB)

**DEFENDANTS’ MOTION *IN LIMINE* NO. 2  
TO EXCLUDE EVIDENCE OF ANONYMOUS AMAZON.COM INQUIRY**

Defendants American Covers, LLC, d/b/a Handstands (“Handstands”), Energizer Holdings, Inc., and Energizer Brands, LLC (collectively, with Handstands, “Energizer”) respectfully move *in limine* to exclude evidence concerning an anonymous Amazon.com inquiry.

**I. EVIDENCE AT ISSUE**

Plaintiffs’ Exhibit P-094 (the “Challenged Exhibit”) contains a hearsay declaration from Jesse Jensen, a paralegal at Amazon.com (the “Jensen Declaration”). *See* Annex A. The declaration purports to attach “Exhibit A” and “Exhibit B,” but there are no such delineations in the attachments to the Challenged Exhibit. In fact, the first page of the attachments includes “Page 2 of 2” at the top and appears not to contain any relevant information. None of the attachments bears a Bates number.

The remainder of the Challenged Exhibit following the Jensen Declaration appears to show portions of an Amazon.com page that depict one of the accused products in this action (the “Amazon Listing”). On “Page 4 of 6,” there is an inquiry reading: “Is the can of Midnight Black

Ice [sic] the same as the spray, and the hanging trees?”

## **II. ARGUMENT**

### **A. The Jensen Declaration is Hearsay**

The Jensen Declaration contains nothing but out-of-court statements, which Plaintiffs intend to offer to prove the truth of the matters asserted in those statements. Fed. R. Evid. 801(c). No exception applies. *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997) (“Affidavits are ordinarily inadmissible at trials . . .”). Accordingly, the Jensen Declaration should be excluded.

### **B. The Amazon Printout Lacks Foundation and are Irrelevant**

Even if Plaintiffs can lay proper foundation for the Amazon Listing without the Jensen Declaration (Fed. R. Evid. 602, 901), the printout should be excluded as irrelevant. Fed. R. Evid. 402.

“Generally, a plaintiff charging infringement attempts to prove actual confusion through market surveys reflecting consumer confusion and through anecdotal evidence of consumer confusion.” *Windsor, Inc. v. Intravco Travel Centers, Inc.*, 799 F. Supp. 1513, 1524–25 (S.D.N.Y. 1992). Plaintiffs intend to offer the Amazon Printout as “anecdotal evidence of consumer confusion,” but at least one court in this Circuit has found—after a bench trial—that the exact type of inquiry reflected in the Amazon Printout does not show actual confusion. *See, e.g., Real News Project, Inc. v. Independent World Tel., Inc.*, No. 06 Civ. 4322 (GEL), 2008 WL 2229830, at \*18 (S.D.N.Y. May 27, 2008) (finding that an email “inquiring whether RNP was the same organization that Paul Jay has launched” did “not amount to actual confusion”) (internal quotation marks omitted).

Even if the single inquiry reflected in the Amazon Printout could potentially be probative

of confusion—and it is not—Plaintiffs have no evidence that the inquiry was posted by a relevant consumer. Accordingly, it must be excluded as irrelevant.

To begin, “[a] trademark is inherently territorial and it exists in each country solely according to that particular country’s statutory scheme.” *Calzaturificio Rangoni S.p.A. v. U.S. Shoe Corp.*, 868 F. Supp. 1414, 1418 (S.D.N.Y. 1994). Accordingly, only confusion among United States consumers is relevant. *See* 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (“McCarthy”) § 29:2 (5th ed. 2022); *Double J of Broward Inc. v. Skalony Sportswear Gmbh*, 21 U.S.P.Q.2d 1609 (T.T.A.B. 1991) (“Information concerning . . . foreign activities . . . is not relevant” to issue of likelihood of confusion). Plaintiffs have no evidence that the inquiry in the Amazon Printout came from the United States, so it should be excluded. *See Jamdat Mobile, Inc. v. Jamster Int’l Sarl Ltd., Inc.*, No. CV 05-3945 PA (FMOx), 2005 WL 5960925, at \*1 (C.D. Cal. Oct. 28, 2005) (granting motion *in limine* “to exclude evidence regarding confusion or lack thereof between the parties’ marks outside the United States”).

In addition, Defendants sold the accused products only to retailers and distributors, who sold to their consumers for air fresheners, meaning only confusion among those groups is relevant. That is because a trademark plaintiff must prove “a probability of confusion, not a mere possibility, affecting *numerous ordinary prudent purchasers*.” *Star Indus., Inc. v. Bacardi & Co. Ltd.*, 412 F.3d 373, 383 (2d Cir. 2005) (emphasis added). Here, the inquiry in the Amazon Listing was posted anonymously, meaning Plaintiffs have no evidence that the inquirer comes from a relevant purchasing group. That evidence therefore should be excluded. *See On Site Energy Co., Inc. v. MTU Onsite Energy Corp.*, No. 10-CV-1671 (JS)(WDW), 2013 WL 3990919, at \*9 (E.D.N.Y. Aug. 2, 2013) (purported confusion evidence excluded as irrelevant because it did not arise among the relevant group of purchasers).

### III. CONCLUSION

In accordance with the foregoing, Energizer's Motion *in Limine* No. 2 should be granted.

Dated: June 15, 2022

By: By: /s/ William H. Brewster  
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*Counsel for Defendants American Covers,  
LLC, Energizer Holdings, Inc., & Energizer  
Brands, LLC*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

CAR-FRESHNER CORPORATION,  
and JULIUS SAMANN LTD.,

Plaintiffs,

v.

AMERICAN COVERS, LLC F/K/A  
AMERICAN COVERS, INC. D/B/A  
HANDSTANDS, ENERGIZER HOLDINGS,  
INC., and ENERGIZER BRANDS, LLC,

Defendants.

Civil Action No. 5:17-cv-171 (FJS/ATB)

**CERTIFICATE OF SERVICE**

I CERTIFY that on June 15, 2022, the foregoing was served on counsel for Plaintiffs via the Court's CM/ECF system.

/s/ H. Forrest Flemming, III  
H. Forrest Flemming, III

## **ANNEX A**

CASE NO. 5:17-cv-00171-FJS-ATB

PLAINTIFF EXHIBIT NO. **P-094**

DATE ENTERED \_\_\_\_\_

JOHN M. DOMURAD, CLERK

BY: \_\_\_\_\_

DEPUTY CLERK

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORKCAR-FRESHNER CORPORATION and  
JULIUS SAMANN LTD.,

Plaintiff,

v.

AMERICAN COVERS, LLC f/k/a AMERICAN  
COVERS, INC. d/b/a HANDSTANDS,  
ENERGIZER HOLDINGS, INC., and  
ENERGIZER BRANDS, LLC,

Defendants.

Case No. 5:17-cv-171 (TJM/ATB)

**DECLARATION OF JESSE JENSEN  
REGARDING BUSINESS RECORDS OF  
NON-PARTY AMAZON.COM**

Jesse Jensen declares as follows:

1. I am a Paralegal in the Litigation and Regulatory group at Amazon.com ("Amazon"). My responsibilities include investigating, responding to, and managing lawsuits and other legal matters involving Amazon and its affiliates. I make this declaration based on my personal knowledge and my review of Amazon records kept and maintained in the ordinary course of business.

2. Attached as Exhibit A is a true and correct copy of the product detail page, as it exists March 2, 2018, for the listing sold under Amazon Standard Identification Number (ASIN) B01MTDH3OD, and available at the following link:

[https://www.amazon.com/dp/B01MTDH3OD/ref=psdc\\_15735121\\_t4\\_B01N6VDAUR](https://www.amazon.com/dp/B01MTDH3OD/ref=psdc_15735121_t4_B01N6VDAUR).

4. The records in Exhibits A and B reflect data stored on Amazon servers. That data, including specifically the October 29, 2017 question about ASIN B01MTDH3OD, are kept and maintained in the course of regularly conducted activity of Amazon, relied upon by Amazon in the ordinary course, and recorded at or near the time of the event in question.

Executed this 5 day of March, 2018, at Seattle Washington.

Davis Wright Tremaine LLP  
LAW OFFICES  
1201 Third Ave., Ste. 2200, Seattle, WA 98101  
206-622-3150 main 206-757-7700 fax



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Roll over image to zoom in

Refresh Your Car! 09902 Dual Scent Gel Can, 5 oz., Midnight Black/Ice Storm Scent

3 customer reviews

~~\$9.07~~  
**\$3.38 & FREE Shipping** on orders over \$25.  
[Details](#)  
**\$5.69 (63%)**

and sold by Amazon.com. Gift-wrap available.

le

Case  
~~\$92.99~~

Single  
**\$3.38**

el can  
rful fragrance experience in a discreet and easily  
container

- ased gel can with scent control lids
- Scent control with the innovative pop-top lid
- Midnight Black and Ice Storm dual scent

[See more product details](#)

[Compare with similar items](#)

~~Add-on item~~

**This item is available because of the Add-on program**  
The Add-on program allows Amazon to offer thousands of low-priced items that would be cost-prohibitive to ship on their own. These items ship with qualifying orders over \$25.  
[Details](#)

**New (4) from \$3.38 & FREE shipping.**

Share

Add-on Item

Ships with any qualifying order over \$25. [Details](#)

Qty: 1 ▾

Add to Cart

1-Click ordering is not available for this item.

[Deliver to seattle 98101](#)

Add to List

Other Sellers on Amazon

**\$6.44**

Add-on item

Add to Cart

**FREE Shipping** on eligible orders.

Sold by: Prime SuperStore

**New (4) from \$3.38 & FREE shipping.**

Have one to sell?

Sell on Amazon

### Frequently bought together



+



+



Total price: **\$31.27**






Add all three to Cart

Add all three to List

- ☒ **This item:** Refresh Your Car! 09902 Dual Scent Gel Can, 5 oz., Midnight Black/Ice Storm Scent **\$3.38** Add-on item
- ☒ Little Trees U6P-60155 Black Ice Air Freshener, (Pack of 24) **\$14.93**
- ☒ Little Trees Vent Wrap Air Freshener, Black Ice, 4 Packs of 4 **\$12.96**

**Sponsored products related to this item** (What's this?)






Page 1 of 20

				
Moso Natural Air Purifying Bag. Odor Eliminator for Cars, Closets, Bathrooms and Pe...	Car Fragrance Diffuser Air Freshener Vent Clip, Wooden Car Aromatherapy Essential...	Febreze Car Air Freshener, 2 Gain Original and 2 Gain Island Fresh scents (4 count,...	Car Air Freshener - Car Freshener - Air Freshener Car - Car Perfume - Perfumes For ...	Chemical Guys AIR_102_16 Leather Premium Air Freshener and Odor Eliminator ('
217	49	60	59	775
\$37.99	\$12.99	\$13.99	\$11.99	\$9.99





[Ad feedback](#)

**Customers who viewed this item also viewed**

Page 1 of 2

				
Little Trees U6P-60155 Black Ice Air Freshener, (Pack of 24)	Little Trees Vent Wrap Air Freshener, Black Ice, 4 Packs of 4	Little Trees Vent Clip+ Air Freshener, Black Ice, Pack of 4	Driven by Refresh Your Car! 74107 Gel Can, Black Out	California Scents Calif Car Scents 4-Unit Tra Laguna Breeze, 1.5-O Tins (Pack of 4,
1,106	118	25	43	24
\$14.93	\$12.96	\$13.34	4 offers from \$2.96	\$13.23

**Compare with similar items**

			
<b>This item</b> Refresh Your Car! 09902 Dual Scent Gel Can, 5 oz., Midnight Black/Ice Storm Scent	Little Trees U6P-60155 Black Ice Air Freshener, (Pack of 24)	Little Trees Vent Wrap Air Freshener, Black Ice, 4 Packs of 4	Little Trees 2 Oz. Pump Spray Car, Home and Office Air Freshener, Black Ice
<a href="#">Add to Cart</a>	<a href="#">Add to Cart</a>	<a href="#">Add to Cart</a>	<a href="#">Add to Cart</a>

Customer Rating	(3)	(1106)	(118)	(100)
Price	\$3 <sup>38</sup>	\$14 <sup>93</sup>	\$12 <sup>96</sup>	\$5 <sup>99</sup>
Shipping	FREE Shipping	FREE Shipping	FREE Shipping	FREE Shipping
Sold By	Amazon.com	Amazon.com	Amazon.com	Prime SuperStore
Color	—	Black Ice	Black Ice	—
Item Dimensions	2.9 x 2.9 x 2.7 in	1 x 1 x 1 in	3 x 7.5 x 1.75 in	2.2 x 4.2 x 1 in
Item Weight	—	2.88 ounces	0.8 ounces	3.2 ounces
Size	Single	—	16 Pack	—
Style Name	—	Black Ice	Freshener, 16 Pack	—

## Special offers and product promotions

Size: **Single**

- **Your cost could be \$0.00 instead of \$3.38** Get a **\$50 Amazon.com Gift Card** instantly upon approval for the **Amazon Rewards Visa Card** [Apply now](#)

## Have a question?

Find answers in product info, Q&As, reviews

## Product information

Size: **Single**

### Technical Details

Brand	Refresh Your Car
Item Weight	7.5 ounces
Product Dimensions	2.9 x 2.9 x 2.7 inches
Item model number	09902
Manufacturer Part Number	09902
<a href="#">Cover Included</a>	1 5oz Gel Can Midnight Black/Ice Storm

### Additional Information

ASIN	B01MTDH3OD
Customer Reviews	<a href="#">3 customer reviews</a> 2.7 out of 5 stars
Best Sellers Rank	#106,857 in Automotive ( <a href="#">See top 100</a> ) #605 in Automotive > Interior Accessories > <a href="#">Air Fresheners</a> #800 in Automotive > RV Parts & Accessories > <a href="#">Furnishings &amp; Interior Accessories &gt; Air Fresheners &amp; Dehumidifiers</a>
Shipping Weight	7.5 ounces ( <a href="#">View shipping rates and policies</a> )
Domestic Shipping	Currently, item can be shipped only within the U.S. and to APO/FPO addresses. For APO/FPO shipments, please check with the manufacturer regarding warranty and support issues.
International Shipping	This item is not eligible for international shipping. <a href="#">Learn More</a>
Date First Available	January 27, 2017

### Feedback

If you are a seller for this product, would you like to [suggest updates through seller support?](#)

Would you like to [tell us about a lower price?](#)

## Product description

Size: **Single**

The Refresh Your Car Dual Scent Gel Can packs a powerful fragrance experience in a discreet and easily hidden container. The 5oz Dual Scent gels delivers two great fragrances in a single yet beautiful container and offers scent control with the innovative pop-top lid. If you are looking for a discreet air freshener option, look no further than Refresh Your Car Cans!.

## Customers who bought this item also bought



Little Trees U6P-60155



Little Trees Vent Clip+ Air



Little Trees Vent Wrap Air



Refresh Your Car! 09538

**Sponsored products related to this item** (What's this?)

Page 1 of 14



Febreze Car Air Freshener, 2 Linen & Sky and 2 Hawaiian Aloha scents (4 count, .06 ...

60

\$13.99



Car Air Freshener - Ca Freshener - Air Freshene Car - Car Perfume - Perfumes For ..

59

\$11.99



California Scents California Car Scents 4-Unit Trays, Laguna Breeze, 1.5-Ounce Tins...

24

\$13.23



Moso Natural Air Purifying Bag, Odor Eliminator for Cars, Closets, Bathrooms and Pe...

217

\$37.99



Poo-Pourri Before-You Toilet Spray 4ml Travel Size Disposable Spritz Lavender..

9678

\$4.99

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votes

**Question:** Is the can of Midnight Black Ice the same as the spray, and the hanging trees?

**Answer:** This is made by a different manufacturer and smells different  
By Discount Detailers **SELLER** on October 29, 2017

**Customer Reviews**

3  
2.7 out of 5 stars

5 star 33%  
4 star 0%  
3 star 0%  
2 star 0%  
1 star 67%

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**Didn't meet my expectations at all**

March 22, 2017

Size: Case **Verified Purchase**

Pretty packaging but doesn't serve it's purpose. Opened two but still doesn't release the scent. Not to mention the two times the sent me a photo album when I ordered car fresheners. Got it right on the third time but this product doesn't freshen your car. Sucked coz the packaging was cool.

[Comment](#)

Was this review helpful to you?

[Report abuse](#)



Eldin Arifovic

**Five Stars**

January 21, 2018

Size: Single **Verified Purchase**

Removes All Odors

[Comment](#)

Was this review helpful to you?

[Report abuse](#)



thomas

**One Star**

February 4, 2018

Size: Single **Verified Purchase**

Have 2 in my truck, cant smell them at all, have them both opened all the way up.

[Comment](#)

Was this review helpful to you?

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**Pages with related products.** See and discover other items: [black ice car freshener](#)



Moso Natural Air Purifying Bag. Odor Eliminator for Car

**\$37.99**

217

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Amazon Music Stream millions of songs	Amazon Drive Cloud storage from Amazon	6pm Score deals on fashion brands	AbeBooks Books, art & collectibles	ACX Audiobook Publishing Made Easy	Alexa Actionable Analytics for the Web	Amazon Business Everything For Your Business
AmazonFresh Groceries & More Right To Your Door	AmazonGlobal Ship Orders Internationally	Home Services Handpicked Pros Happiness Guarantee	Amazon Inspire Digital Educational Resources	Amazon Rapids Fun stories for kids on the go	Amazon Restaurants Food delivery from local restaurants	Amazon Video Direct Video Distribution Made Easy
Amazon Web Services Scalable Cloud Computing Services	Audible Download Audio Books	AudiobookStand Discount Audiobooks on Disc	Book Depository Books With Free Delivery Worldwide	Box Office Mojo Find Movie Box Office Data	ComiXology Thousands of Digital Comics	CreateSpace Indie Print Publishing Made Easy
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Kindle Direct Publishing Indie Digital Publishing Made Easy	Prime Now FREE 2-Hour Delivery on Everyday Items	Prime Photos Unlimited Photo Storage Free With Prime	Shopbop Designer Fashion Brands	TenMarks.com Math Activities for Kids & Schools	Warehouse Deals Open-Box Discounts	Whole Foods Market America's Healthiest Grocery Store
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0

[Cart](#)**Is the can of Midnight Black Ice the same as the spray, and the hanging trees?**

asked on October 29, 2017

**Answer this question**

Your answers help others learn about this product.

[See all questions about this product](#)[Answer](#)

[Refresh Your Car!09902](#)  
Dual Scent Gel Can, 5  
oz., Midnight Black/Ice  
Storm Scent

Showing 1-1 of 1 answers

This is made by a different manufacturer and smells different

Discount Detailers [SELLER](#) answered on October 29, 2017[Leave a Comment](#) | Do you find this helpful? [Yes](#) [No](#) | [Report abuse](#)[← Previous](#) [1](#) [Next →](#)**Your recently viewed items and featured recommendations**

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Page 1 of 6



[Little Trees Vent Clip+ Air  
Freshener, Black Ice, Pack  
of 4](#)

25

**\$13.34**

[Little Trees Vent Wrap Air  
Freshener, Black Ice, 4  
Packs of 4](#)

118

**\$12.96**

[Refresh Your Car!09538  
Vent Sticks, 4 Per Pack,  
Midnight Black/ Ice Storm  
Scent](#)

1

**\$5.20**

[Extend Bar, Peanut Butter  
1.41 oz. Bars \(Pack of 15\)](#)

119

**\$14.86****Best Sellers**

[True Fiction \(Ian Ludlow  
Thrillers Book 1\)](#)  
› [Lee Goldberg](#)

12

Kindle Edition  
**\$4.99**

[Digging In: A Novel](#)  
› [Loretta Nyhan](#)

21

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Mystery of Belle...](#)  
› [Harold Schechter](#)


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of the Kitchen](#)  
› [Hannah Howard](#)

7


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**A Glimmer of Hope** (The Avalon Chronicles Book 1)  
› Steve McHugh  
4  
Kindle Edition  
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**Say You're Sorry** (Morgan Dane Book 1)  
› Melinda Leigh  
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Kindle Edition  
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**White Rose, Black Forest**  
› Eoin Dempsey  
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Digital Educational Resources

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Fun stories for kids on the go

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America's Healthiest Grocery Store

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